

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3

4 Trustees of the Operating Engineers Pension Trust, et
5 al.,

6 Plaintiffs

7 v.

8 Forsman, Inc., et al.,

9 Defendants

2:13-cv-01456-JAD-GWF

Order Denying Motion for Attorney's
Fees and Denying Motion to Strike as
Moot

[ECF Nos. 52, 57]

10 The plaintiff trustees of several trusts ("Trustees") sued Forsman, Inc., Horizon Surveys, LLC
11 ("HSL"), John Forsman, Pamela L. Forsman, and Ryan Sligar for breach of contract and breach of
12 fiduciary duty under ERISA. On February 16, 2016, I granted HSL and Sligar's motion for summary
13 judgment, and these defendants now move for attorney's fees.¹ The Trustees oppose the defendants'
14 request² and move to strike portions of their reply brief.³ I deny the defendants' motion for fees
15 because they have not carried their burden to show that fees are justified in this case, I disregard their
16 attempt to remedy that deficiency with their reply, and I deny the motion to strike as moot.⁴

17 **Discussion**

18 Defendants move for costs under Federal Rules of Civil Procedure 54(d)(1) and 68(d) and for
19 attorney's fees under FRCP 11, 29 U.S.C. § 1332(g)(1), and the Nevada Rules of Professional
20 Conduct. I deny as moot defendants' request for \$2,574.66 in costs because the Clerk has already
21 taxed these costs against the Trustees.⁵ This leaves only the defendants' request for \$71,436.21 in
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23 ¹ ECF No. 52.

24 ² ECF No. 53.

25 ³ ECF No. 57.

26 ⁴ I find these motions suitable for disposition without oral argument. L.R. 78-2.

27 ⁵ ECF No. 55 (Costs taxed in the amount of \$2,574.66 against plaintiffs); ECF No. 51 (defendants'
28 unobjected-to bill of costs).

1 fees for me to consider. Neither FRCP 11 nor the Nevada Rules of Professional Conduct is an
 2 appropriate basis for an award of attorney's fees. The defendants did not comply with the procedural
 3 requirements for seeking Rule 11 sanctions,⁶ and the Nevada Rules of Professional Conduct are not a
 4 fee-shifting statute.⁷ The only colorable basis for awarding attorney's fees that the defendants have
 5 identified is thus ERISA's fee provision, and defendants' failure to undertake an analysis of the
 6 relevant authority in the motion leaves me unconvinced that fees are warranted.

7 **A. Attorney's fees under 29 U.S.C. § 1132(g)(1)**

8 The American Rule recognizes that each party in litigation must bear its own attorney's fees
 9 in the absence of a rule, statute, or contract authorizing an award of fees.⁸ ERISA is a fee-shifting
 10 statute; it allows a court to award "a reasonable attorney's fee and costs of the action"⁹ to a party that
 11 has achieved some degree of success on the merits of the claim.¹⁰ Once a court makes the threshold
 12 determination that the moving party has achieved some success on the merits, it must consider the
 13 five factors outlined by the Ninth Circuit in *Hummel v. S.E. Rykoff & Co.* to determine whether an
 14 award of fees is warranted:

20 ⁶ FED. R. CIV. PROC. 11(c)(2) ("A motion for sanctions must be made separately from any other
 21 motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must
 22 be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper,
 23 claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after
 service").

24 ⁷ The provisions that the defendants cite simply require that the contingent-fee agreement notify the
 25 client that, under certain circumstances, he or she may be liable for the opposing party's attorney's
 fees and costs in the event of a loss.

26 ⁸ *MRO Commc'n Inc. v. Tel. & Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999).

27 ⁹ 29 U.S.C. § 1332(g)(1).

28 ¹⁰ *Hardt v. Reliance Standard Ins. Co.*, 560 U.S. 242, 244–45 (2010).

1 (1) the degree of the opposing parties' culpability or bad faith; (2) the
2 ability of the opposing parties to satisfy an award of fees; (3) whether
3 an award of fees against opposing parties would deter others from
4 acting under similar circumstances; (4) whether the parties requesting
fees sought to benefit all participants and beneficiaries of an ERISA
plan or to resolve a significant legal question regarding ERISA; and (5)
the relative merits of the parties' positions.¹¹

5 The Ninth Circuit has recognized that, although § 1332(g)(1) allows defendant-employers to recover
6 attorney's fees, these factors very frequently counsel against awarding attorney's fees against ERISA
7 plaintiffs.¹²

8 In their opposition, the Trustees quickly point out that, except for bad faith, albeit in a
9 different context, the defendants failed to address any of the *Hummel* factors. The defendants
10 attempt to cure this fatal defect by addressing—for the first time—these factors in their 37-page reply
11 brief. Courts have consistently declined to consider arguments that are raised for the first time in
12 reply and I do the same.¹³ By discussing these factors for the first time in their reply brief,
13 defendants have deprived the Trustees of their opportunity to fully respond to them, so I disregard
14 the reply brief. I thus deny as moot the Trustees' motion to strike the portions of the defendants'
15 reply brief discussing these factors. Because the defendants failed to carry their burden to show that
16 the *Hummel* factors warrant an award of attorney's fees in their motion, I deny their motion.¹⁴

23 ¹¹ *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980).

24 ¹² *Carpenters S. Cal. Admin. Corp. v. Russel*, 726 F.2d 1410, 1416 (9th Cir. 1983).

25 ¹³ See e.g. *FT Travel–New York, LLC v. Your Travel Center, Inc.*, 112 F. Supp. 3d 1063, 1079 (C.D.
26 Cal. 2015) (collecting cases).

27 ¹⁴ Because I deny the defendants' motion for fees on this basis, I need not and do not reach the
28 Trustees' remaining arguments that the defendants' proffered *Lodestar* evidence is insufficient.

Conclusion

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that **defendants' motion for attorney's fees [ECF No. 52] is DENIED; plaintiffs' motion to strike [ECF No. 57] is DENIED as moot.**

Dated this 28th day of July, 2016.



Jennifer A. Dorsey
United States District Judge